SUPREME COURT, U. S.

Supreme Court, U. S.
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in the Supreme Court of the United States

NO. 74-1292

WILLIAM MICHAEL PARKS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner, WILLIAM MICHAEL PARKS, respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 13, 1975.

OPINION BELOW

The Court of Appeals affirmed with opinion Petitioner's conviction on March 13, 1975 in case number 73-2236. (See Appendix A hereto) A Petition for rehearing was not filed in this cause.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 13, 1975. Jurisdiction of this Court is invoked under Title 28, United States Code, §1254(1) and Rule 19(1) (b), United States Supreme Court Rules.

QUESTIONS PRESENTED

I.

WHETHER THIS HONORABLE COURT SHOULD SANCTION THE PROCEDURE WHEREBY A FEDERAL DEFENDANT, AFTER PLEADING GUILTY OR NOLO CONTENDERE IN THE FEDERAL COURT, MAY STILL PRESERVE FOR APPEAL ADVERSE PRETRIAL RULINGS ON NONJURISDICTIONAL ISSUES?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution,
Amendment Five:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

On March 14, 1973 the Petitioner was indicted for various violations of the Federal Narcotics Laws. After Petitioner entered his plea of not guilty, his trial counsel filed a motion to suppress evidence alleging that the contraband which formed the basis of the prosecution, was seized illegally. Following a denial of this motion to suppress, the Petitioner was granted a motion to withdraw his previously entered plea of not guilty and to substitute a plea of nolo contendere to Count I of the indictment. The Petitioner was sentenced to three (3) years of imprisonment with an additional parole term of two (2) years.

The United States Court of Appeals for the Fifth Circuit refused to hear the merits of the Petitioners suppression motion stating that he was foreclosed from raising said issue based upon the Fifth Circuit's decision in the case *United States v. Sepe*, 486 F.2d 1044 (5th Cir. en banc 1973) wherein it was held that a defendant, after entering a plea of nolo contendere or guilty, may only appeal the jurisdictional defects in the proceedings below. It was further held that the practice whereby a district court accepted a plea sanctioning an agreement between the prosecution and defense under which the defendant would be allowed to raise nonjurisdictional defects on appeal was expressly disapproved.

REASONS FOR GRANTING THE WRIT

The decision below would be reviewed by the Court for the following reason:

I.

THIS HONORABLE COURT SHOULD SANCTION THE PROCEDURE WHEREBY A FEDERAL DEFENDANT, AFTER PLEADING GUILTY OR NOLO CONTENDERE IN THE FEDERAL TRIAL COURT, MAY STILL PRESERVE FOR APPEAL ADVERSE PRE-TRIAL RULINGS ON NONJURISDICTIONAL ISSUES.

The traditional view states that a plea of guilty or nolo contendere waives all non-jurisdictional issues so that an appeal therefrom is unavailable. *Hughes v. United States*, 371 F.2d 694 (8th Cir., 1967); *Jenkins v. Beto*, 442 F.2d 1001 (5th Cir., 1971). However, the reasoning underlying this view is subject to much criticism. The prevailing rationale is that a conviction following an admission of guilty is based solely and entirely upon the admission and not upon any evidence which may have been acquired by the prosecuting authorities. This statement created a legal fiction. A criminal defendant is not likely to confine his judgment as to whether to plead guilty merely upon the allegations in the indictment but rather said defendant will look at the strength of the government's case, including the tangible evidence, statements of witnesses, statements of the accused, and many other relevant factors. To declare that a criminal defendant pleads guilty because he is guilty, is to ignore the obvious.

The Supreme Court has recognized that, "The decision to plead guilty before the evidence is in, frequently involves the making of difficult judgments . . ." *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

Another argument advanced in support of the traditional view is that if a defendant is permitted to challenge evidence which has never been introduced against him, the appellate court must decide questions in the abstract without the benefit of a record showing the significance of that evidence. This argument ignores the fact that a record of the transcript of proceedings at a hearing on defendant's motion to suppress more than adequately forms a record upon which an appellate court can determine whether the evidence was seized legally. Moreover, an appellate court can readily discern the significance of evidence if said evidence serves as a basis of the prosecution.

The concept of waiver is the foundation of the traditional view regarding guilty pleas. In the landmark case of *Johnson v. Zerbst*, 304 U.S. 458 (1938) the Supreme Court announced that a waiver of a constitutional right must be an intentional relinquishment or abandonment of a known right or privilege. To be valid, a waiver must be knowingly, intentionally, and voluntarily made. Although the right to direct appellate review in a criminal case is not a specific guarantee of the Constitution (*Griffin v. Illinois*, 351 U.S. 12, 20 (1956)), it has, nonetheless, established itself firmly in the American system of jurisprudence. Courts scrutinize very carefully any waiver that occurs during a criminal proceeding. *Boykin v. Alabama*, 395 U.S. 238. For a defendant to plead guilty and

thereafter forfeit his right to appeal on non-jurisdictional issues works havoc with the accepted principles relating to waiver when it is assumed that the right to appeal is of the same status as other important procedural and substantive rights. One legal writer has stated that since a plea of guilty waives all objections a defendant may have as to evidence in the hands of the prosecution, it should be incumbent upon the trial judge to affirmatively warn the defendant as to this waiver. 20 A.L.R. 3d 724, "Plea of guilty as waiver of claim of unlawful search and seizure."

The question of what "non-jurisdictional" entails escapes exact definition. One writer has stated:

> "The jurisdiction of a court equals its power over the subject matter. If there were a constitutional violation, any indictment or information founded on that violation should be a nullity since the State brought the accused into custody through illegal means. If so, then the alleged offense should not be brought to trial if discovered through a fourth amendment violation. If it cannot be proven that a crime was committed, the indictment cannot charge an offense. This contention amounts to no jurisdiction . . . This reasoning should apply to any conviction resulting from alleged constitutional overreaching. Whether it be an illegal search, coerced confession, or inadequate counsel, the issue is jurisdictional since it goes to the very roots of why the accused is in custody. Jurisdictional defects were never intended to be waived. *9 Houston L.* 305, 314 (1971).

This view is reasonable in light of judicial disfavor of waiver of essential rights.

The entire question of allowing appeals on non-jurisdictional issues following a plea of guilty or nolo contendere must ultimately be decided upon a consideration of judicial policy. In the forefront of advocating change from the traditional view is the American Bar Association's standards relating to criminal appeals. Section 1.3 of these standards states:

> 1.3 — Limitations on defendant's appeal: Final judgments and interlocutory appeals. (a) A defendant should have the right to seek review of any final judgment adverse to him, including:
>
> (i) A conviction followed by a sentence or probation, or
>
> (ii) A conviction followed by a sentence suspended as to imposition or execution, or
>
> (iii) A *conviction based upon plea of guilty or nolo-contendere.*

The commentary accompanying this standard urges that "It is wasteful to force a defendant to stand trial in order not to have a forfeiture of appellate review."

Both the State of New York and California[1] have adopted statutory provisions permitting appeal on non-jurisdictional issues notwithstanding a plea of guilty or nolo contendere. Section 813-c of the New York Code of Criminal Procedure states:

[1] *People v. Lawson*, 1 Cal. App. 3d 730, 81 Cal. Rptr. 883 (1970).

> If the motion (to suppress) is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty.[2]

Professor Wright in his treatise on the Federal Courts has commented approvingly on the New York procedure by stating:

> "A similar procedure of the Federal Courts, either adopted by statute or, if it is within the rule making power, by amendment to the rules, would be highly desirable." Wright, *Federal Practice and Procedure*, Criminal section 175. See also: *United States v. Dorsey*, 449 F.2d 1104, 1108 note No. 18 (D.C. Cir. 1971)

Judge Irving Kaufman, speaking for the Second Circuit, made the following comment in *United States ex. rel. Rogers v. Warden of Attica State Prison*, 381 F.2d 209 (2nd Cir. 1967):

> New York has thus provided a specific statutory exception to the general rule that a plea of guilty bars the defendant from raising on appeal alleged non-jurisdictional defects. And, we are quite easily able to discern legitimate and powerfully compelling reasons for establishing such an exception. In the greater number of cases, the present one being illustrative, a defendant in a criminal case

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[2]See: 9 Houston R. Rev. 305, 317 (1971) for statistics on impact of this provision on New York's Appellate system.

> recognizes that unless he succeeds in suppressing the evidence seized, the State will have little difficulty in proving the charges filed against him. A defendant may well have no desire to go to trial once his pre-trial suppression motion has been denied, and thereafter may lose heart for any defense to the charges. If, however, the defendant is confronted with State law which decrees that a plea of guilty bars him from appealing the denial of his motion, then he will be presented with a *fait accompli* and be forced to proceed to trial just so that he can preserve his right to appeal. Section 813-c is an enlightened statute and was designed to alleviate this undesirable and archaic end which can only result in cluttering trial calendars. The guilty plea in such circumstances is merely a procedural step which permits review of the defendant's constitutional claims without the necessity of a trial that would be a waste of time, money and manpower.

In addition, the protections of the Fourth Amendment are indirectly impeded by disallowing appeals from guilty pleas. In *United States v. Pate*, 222 F.Supp. 998 (N.D. Ill., 1963) in dictum it was stated:

> The decision which denies to one who pleads guilty the opportunity thereafter to challenge a constitutional violation seems to me to weaken that security from harassment for they encourage police officers to invade privacy and conduct interrogation in the hope of obtaining incriminating evidence, confessions and ultimately guilty pleas.

The practicalities of permitting an appeal after a plea of guilty or nolo contendere cannot be ignored. There is no escaping the fact that at times a criminal case hinges entirely upon certain tangible evidence. If this evidence were seized illegally, the government cannot put on a case. After the trial judge makes a ruling on the defendant's pre-trial motion to suppress, if it be adverse to the defendant, there is little left for the government to do but perfunctorily present its case.

With the crowded condition of many trial courts dockets many avenues have been explored in an attempt to relieve the congestion. Plea bargaining has become an everyday necessity. It appears that a logical extension from plea bargaining, would be to permit appeals on non-jurisdictional issues after pleas of guilty. By this means, a defendant can have those essential issues litigated pre-trial with subsequent appellate review without having a jury impaneled to hear the case in its entirely. The advantages to be derived from this procedure easily lay to rest any objections to its use in the Federal courts.

Another aspect of the problem which requires consideration is a possibility of a motion pursuant to 28 U.S.C. Section 2255 based upon an alleged involuntary guilty plea in that the plea was a product of evidence seized illegally. At first glance it would appear that *McMann v. Richardson*, 397 U.S. 759 (1970) would be dispositive of this issue. In *McMann* it was argued that since the confession which had induced the guilty plea was involuntarily made, the guilty plea was also involuntarily made. The Supreme Court rejected this position relying heavily on the fact that the defendant was competently advised by counsel. Further the court stated that the choice of the defendant

might have been based upon a misassessment of the government's case and/or an error in legal judgment. The *McMann* case can be read as standing for the broad proposition that when a defendant's plea of guilty is based upon reasonably competent advice it is an intelligent and voluntary plea, not open to atack. However, the *McMann* case involved an allegedly coerced confession. If the pretrial motion to suppress this confession were denied by the trial judge, all is not lost for under the procedure as outlined in *Jackson v. Denno*, 378 U.S. 368 (1964) the jury can still make a determination as to voluntariness and subsequently not use the confession during its consideration. There then is some advantage for proceeding to trial since the determination of the trial judge as to the confession is not final. That is not the situation when dealing with an illegal search and seizure claim. The trial judge's determination is final. The jury will ultimately be presented with the seized evidence in support of the government's case. Once the trial judge makes the determination as to the legality of the seizure, nothing that occurs at trial is likely to disturb this decision. It readily follows that a guilty plea can very well be the product of illegally seized evidence.

Parenthetically, it would appear that under the holding of *Santobello v. New York*, 404 U.S. 257 (1971) that any agreement between the defense and prosecution as to the preservation of appellate review would require said review upon the entry of a plea. *United States v. Cook*, 463 F.2d 123 (5th Cir. 1972); *United States v. Rosenberg*, 458 F.2d 1183 (5th Cir. 1972).

CONCLUSION

Logic dictates that it is foolish to require a defendant to complete a criminal trial, with a jury, merely to be afforded an appeal on an issue that was litigated and determined at pre-trial. Judicial time, money and manpower, currently at a premium, can be best conserved by adopting the procedure herein.

For the foregoing reasons, the Petition for Certiorari should be granted and the judgment of the Court of Appeals reversed.

Respectfully submitted,

/s/ Melvyn Kessler

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petition for Writ of Certiorari was mailed to the United States Attorney's Office, 300 Ainsley Building, 14 N.E. 1st Avenue, Miami, Florida 33132 and to the Solicitor General of the United States, United States Department of Justice, Washington, D.C. 20530.

/s/ Melvyn Kessler

MELVYN KESSLER